No. 9568

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 19

GUISEPPE MAITA,

Appellant,

vs.

EDW. L. HAFF, District Director of Immigration and Naturalization for the District of San Francisco, California,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,

R. B. MCMILLAN,
Assistant United States Attorney,

L. R. MERCADO,
Assistant United States Attorney,
Post Office Building, San Francisco,

Attorneys for Appellee.

ARTHUR J. PHELAN,
U. S. Immigration and Naturalization Service,
Post Office Building, San Francisco,

On the Brief.

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JURISDICTIONAL STATEMENT.

Appellant, an alien in custody under a warrant of deportation (Exhibit "A" p. 46),[1] filed a petition (T. 1-6) for a writ of habeas corpus in the District Court, which had jurisdiction of said habeas corpus proceeding under 28 U. S. C. Sections 451-453.

Jurisdiction to review the District Court's order (T. 16-18) denying appellant's petition for a writ of habeas corpus is conferred upon this Court by 28 U. S. C. Section 463.

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1. For convenience, the numbering in pencil on the lower right hand corner of the pages of the immigration record will be used throughout this brief.

By order of this Court, entered pursuant to Section 8(b) of the Reorganization Act of 1939 (53 Stats. L. 561), Edward L. Haff has been substituted as appellee for and in place of John J. McGrath.

STATEMENT OF THE CASE.

The deportation order is based upon that portion of Section 19 of the Immigration Act of February 5, 1917 (8 U. S. C. Section 155), which reads as follows:

> "* * * except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States * * * shall, upon the warrant of the Secretary of Labor,[2] be taken into custody and deported."

Appellant has been convicted and sentenced to imprisonment for a term of eighteen months for the offense of engaging in and carrying on the business of a distiller of alcohol with intent to defraud the United States of the tax on the spirits distilled (Ex. "A" pp. 6-1). The only fact in dispute is whether appellant's last entry into the United States occurred less than five years before the offense was committed.

On January 13, 1937, shortly after appellant was received at the Federal Penitentiary at McNeil Island, he was questioned under oath by an immigration

2. This function has since been transferred to the Attorney General.

officer relative to his right to be and remain in the United States (Exhibit "A" pp. 15-11). At that time he stated that he first came to the United States in April, 1906, and that he had subsequently made a visit to Mexico, *"about 4 years ago"* (Id. p. 12). Questioned further as to that visit, he stated that he had traveled "by auto, in my son's car" (Id. p. 12). He was then asked the following question and gave the following answer:

> "Q. That was four years ago?
> A. I think so, *it was three or four months before the country went wet.* It was in the summer." (Id. p. 12.)

This testimony would definitely fix appellant's last entry as occurring in the summer of 1933. The offense referred to above was committed on July 17, 1936 (Exhibit "A" pp. 6-5).

Thereafter a warrant of arrest was issued by the Assistant to the Secretary of Labor (Exhibit "A" p. 17). A few days later an attorney at Washington, D. C., requested the Department of Labor at Washington to notify him when the record of the hearing was received so that he might appear before the Board of Review at Washington in appellant's behalf (Id. p. 18).

Subsequently a hearing was held at the penitentiary (Id. pp. 40-37). Appellant was informed of the purpose of the hearing, the warrant of arrest was read and explained to him, and he was advised of his right to counsel, which he waived (Id. p. 39). The charge in the warrant of arrest was again read to

him and he was asked what he had to say concerning it. He described his family ties in this country, stated that the charge contained in the warrant was true, as were the statements he had previously made to the inspector, and that he had no witnesses that he wished to testify in his behalf (Id. p. 38).

Upon receipt of the record of the hearing, the Board of Review at Washington heard appellant's Washington counsel in oral argument on January 25 and February 2, 1938. The memorandum of the Board discusses the facts and the contentions then made by counsel (Id. pp. 45-44). It will be observed that at that time no contention was made that appellant's last entry had occurred earlier than as shown in his preliminary examination.

The warrant of deportation was then issued (Id. p. 46) but at the request of appellant's Washington counsel a stay was granted to afford appellant an opportunity to apply for a pardon and, since his sentence had expired, release on bail was directed (Id. p. 44).

Application for a pardon was subsequently made (Id. pp. 67-59). In that application it was stated that appellant had made a short visit to Mexico *"in 1933"* (Id p. 66).

Failing to obtain a pardon (Id. p. 84), appellant's Washington counsel presented to the Secretary of Labor a petition for a further stay of deportation on the grounds of hardship (Id. pp. 80-77) which was denied (Id. p. 83). Up to that point no contention was made that appellant had last entered the United States earlier than as theretofore stated.

Thereafter, appellant's present counsel requested the Department to reopen the case (Id. pp. 89-88), later supplementing his request with a formal petition of appellant wherein he represented "that his trip to Tiajuana, Mexico, occurred either in the month of April or May, 1929" (Id. p. 130) and with an accompanying affidavit of one Nuccio, alleging that affiant had accompanied appellant to Mexico during April or May, 1929 (Id. pp. 126-125).

The petition for reopening of the case was denied at that time (Id. pp. 138-137), but the case was subsequently reopened (Id. p. 152) pursuant to an order of the Court below remanding the case to the immigration authorities for further hearing to give appellant opportunity to present further evidence (Id. p. 150).

At the hearings on reopening (Id. pp. 182-159) Nuccio testified that he made a trip to Mexico with appellant in April or May, 1929, traveling in appellant's automobile (Id. pp. 177-175). Appellant's wife testified that such a trip of her husband occurred in 1929 (Id. p. 171). At first she testified that she could not swear that her husband had not made a trip to Mexico with his son but later said that she could swear that he had not done so (Id. p. 172). Another witness, Costanzo, testified that he had seen appellant in Mexico in April or May, 1929 (Id. p. 167). Appellant himself testified that he had gone to Mexico on only one occasion, that he traveled in his own car with Nuccio at that time, and that the trip occurred seven or eight months after his daughter was married in 1928 (Id. pp. 165-164).

Regarding the examination at the penitentiary appellant gave the following testimony:

"Q. You were examined, Mr. Maita, by the Immigration Department at McNeil Island; is that correct?

A. Yes.

Q. And did you know at that time when you went to Tiajuana, Mexico?

A. No, I wasn't thinking of it. *I told them it was two or three years previous to that time,* but I couldn't give the time.

Q. The record shows you were examined at McNeil Island in January, 1937; is that correct?

A. That was the time I was there, and when I was asked when I went to Mexico, *I told them it was three or four years before repeal,* but at that time I couldn't think of the exact time.

Q. The record shows you testified that you went three or four months before repeal. Did you give that testimony?

A. I told them it was *three or four years before the time they examined me,* but I do not know what they put down.

Q. Which is correct: Did you go to Tiajuana, Mexico, three or four months before repeal, or three or four years?

A. *Three or four years before the repeal of Prohibition."* (Italics supplied.)

Thereafter the Department considered the case further and ordered that no change be made in the outstanding order of deportation (Exhibit "A" pp. 186-184).

At a subsequent hearing (Id. pp. 201-199) reports of the immigration officials of the Seattle District

who had participated in the examination and hearing at the penitentiary were introduced (Id. pp. 197-194).

By supplemental return in the habeas corpus proceedings the entire record was returned as an exhibit (T. 14-16). Thereafter on May 9, 1940, the Court below entered its order that the petition for writ of habeas corpus be denied (T. pp. 16-18).

QUESTIONS INVOLVED.

The questions before this Court, we submit, are properly to be stated as follows:

1. Was there "any evidence from which the conclusion of the administrative tribunal could be deduced"? (*Branch v. Cahill,* (CCA-9), 88 F. (2d) 545, 546.)

2. Was appellant denied a fair hearing?

ARGUMENT.

The statute (8 U. S. C. Section 155) specifically provides that

> "In every case where any person is ordered deported from the United States under the provisions of this sub-chapter, or of any law or treaty, the decision of the Secretary of Labor shall be final."

The applicable rule is well stated by Mr. Justice Brandeis in

Tisi v. Tod, 264 U. S. 131, 133, 44 S. Ct. 260, 261, 68 L. Ed. 590, 591,

as follows:

> "We do not discuss the evidence; because the correctness of the judgment of the lower court is not to be determined by enquiring whether the conclusion drawn by the Secretary of Labor from the evidence was correct or by deciding whether the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found."
>
> "The denial of a fair hearing is not established by proving merely that the decision was wrong. Chin Yow v. United States, 208 U. S. 8, 13. This is equally true whether the error consists in deciding wrongly that evidence introduced constituted legal evidence of the fact or in drawing a wrong inference from the evidence."

It has repeatedly been held that statements made by an alien prior to issuance of a warrant of arrest may properly be introduced in evidence at the subsequent hearing under the warrant of arrest, and that the weight to be accorded such statements, like that to be accorded all the other evidence in the case, is a question solely for the administrative authorities.

For example, in

Ikeda v. Burnett (CCA-9), 68 F.(2d) 276,

the alien had testified that he was in Mexico at the time of the Japanese earthquake (September 1, 1923), and for about six months thereafter. At subsequent hearings upon the warrant of arrest he testified that

he came to the United States four or five months before the earthquake, and that he had been mistaken in his earlier statement. He also offered witnesses in corroboration of his claim of earlier entry. This Court said:

> "Under these circumstances the immigration authorities were not bound to accept his testimony that he entered the United States prior to July 1, 1924. The credibility of witnesses is a matter exclusively for the department, unless it can be said from the record that the refusal to ascribe credit to such testimony is arbitrary. (See Wong Fat Shuen v. Nagle, 7 F.(2d) 611; Imazo Itow v. Nagle, 24 F.(2d) 526; Leffer v. Nagle, 22 F.(2d) 800.)
>
> * * * * * * *
>
> "In view of the statement of the appellant under oath that he was in Mexico about six months after September 1923, the immigration authorities cannot be said to have acted arbitrarily in rejecting the testimony of appellant's witnesses to the effect that he was seen by them in the United States prior to that date. Honest witnesses are apt to be mistaken in dates and dishonest ones have little to fear from deliberate falsehood as to dates because of that fact."

Likewise, in

Kishimoto v. Carr (CCA-9), 32 F.(2d) 991,

in a similar situation, this Court said:

> "On the hearings where appellant was represented by counsel, he testified that he had entered the United States in 1921 and had remained therein continuously thereafter. Appellant claims that the order of deportation is erroneous be-

cause he had been present in the United States more than five years. His statements upon arrest, which he reiterated on April 26 and April 28, that he had last entered the United States in August, 1924, justified the contrary conclusion, and was sufficient basis for the order of deportation (Chan Wong v. Nagle (C. C. A.), 17 F.(2d) 987)."

In

Cahan v. Carr (CCA-9), 47 F.(2d) 604,

wherein there was a denial of earlier admissions attributed to the alien and where he contended that he was intoxicated at the time the alleged admissions were said to have been made, his Honor Circuit Judge Dietrich said:

"Upon the questions whether the admissions were made and whether the alien was intoxicated at the time, there was a direct conflict in the testimony, and the want of jurisdiction in the courts to inquire into such conflicts is too well settled to require citation of authorities."

In

Karamoto v. Burnett (CCA-9), 68 F.(2d) 278,

the crucial question was whether the alien had entered before or after the date of the President's Proclamation issued on March 14, 1907. In the preliminary examination he had stated that he had entered in May, 1907. At the subsequent hearing, when represented by counsel, he testified that he entered in May 1906 and stated that he did not remember having said that he came in 1907. This Court said:

"There is evidence in the record to support the finding of the administrative officers, and it is,

therefore, conclusive on this Court. The refusal to accept appellant's testimony that he entered in 1906, after first testifying he entered in 1907, was not arbitrary."

The applicable rules are thoroughly discussed in the decision of this Court in the case of

Koga et ux. v. Berkshire, 75 F. (2d) 820,

wherein this Court said:

"There was conflict in the testimony between that given at the time of arrest and that given at the hearing. The Board believed the former testimony and made its findings accordingly. This court said in Chin Share Nging v. Nagle, etc., 27 F. (2d) 848:

'* * * The conclusions of administrative officers upon issues of fact are invulnerable in the courts, unless it can be said that they could not reasonably have been reached by a fair minded man, and hence are arbitrary.'

"Where the issue rests upon conflicting testimony, the court is not at liberty to review an administrative finding, unless in some other particular the conduct of the officers was such as to render the hearing unfair. Wong Nung v. Carr, etc., 30 F. (2d) 766 (C. C. A. 9).

'For where there is jurisdiction a finding of fact by the executive department is conclusive, * * * and the courts are not at liberty to interfere unless there was either denial of a fair hearing, * * * or the finding was not supported by the evidence, * * * or there was an application of an erroneous rule of law. * * *.'

"Ng Fung Ho, etc. v. White, 259 U. S. 276, 284. The Board was entitled to look to both examina-

> tions in its search for the truth. Ung Bak Foon v. Prentis, 227 Fed. 406, 409 (C. C. A. 7); Prentis v. Seu Leong, 203 Fed. 25, 28 (C. C. A. 7). There can be no conclusion but that appellants were given a fair hearing."

Again, in the case of

Leffer v. Nagle (CCA-9), 22 F. (2d) 800, 801, involving admissions made in the course of the preliminary investigation, which the alien later repudiated, contending that her hearing was seriously impaired and that she must have misunderstood the questions, this Court said:

> "While under the circumstances the testimony touching her admission is not highly convincing, after all, upon established principles, its probative value, as that of any other conflicting testimony, was for the department, and the courts are not at liberty to disturb its findings."

Clearly therefore, it was for the administrative tribunal, and not for the courts, to balance the admissions of appellant against the subsequent testimony to the contrary. Where an admission is put into evidence it is not at all uncommon for the party later to repudiate it on claims of misunderstanding, inadvertence, mistake, etc., as the cases above cited well illustrate. It has, however, never been held that on habeas corpus the courts may try the truth of the facts as to whether the admission was made, or as to its relative weight, if made. In each of the cases cited it was held that these are questions for the trial tribunal which cannot be determined on habeas corpus.

> "It hardly needs to be said that a writ of habeas corpus can never be used for the purpose of correcting erroneous conclusions of fact drawn by those charged by the law with the duty of ascertaining the facts."
>
> *U. S. v. Wong Lai* (CCA-9), 270 F. 57, 59.

We submit that the questions of whether the admission was made and its weight if made, were solely for the administrative officers to decide. This is particularly so in the light of the following circumstances: (1) The original statements that appellant had visited Mexico "about four years ago" and that "it was three or four months before the country went wet" are consistent, whereas in his repudiation of this testimony he admits stating that he had made such a visit "three or four years before the time they examined me" but contends that he *also* stated it was "three or four years before the repeal of prohibition"; the two statements referred to in the latter testimony would be wholly incongruous. (2) All other information given in the McNeil Island statement, consisting of many details as to appellant's personal history and family, are admittedly correct. (3) In the application for pardon which appellant executed after his release from the penitentiary, it is definitely stated that he made a visit to Mexico *"in 1933"*; plainly this could not have been copied from the record of the McNeil Island statement because appellant was then in San Francisco, and the application for pardon was prepared by one A. N. Lanza of San Francisco (Id. p. 66) (note the claim of appellant's wife at the subsequent hearing that she had written appellant

while he was still in the penitentiary advising him that the date of his visit to Mexico was 1929 (Id. p. 170)). (4) The reports of all the immigration officers who had dealings with appellant both in the penitentiary and later in San Francisco definitely indicate that they had no trouble in understanding appellant nor in making appellant understand (Id. pp. 197-194, 157).

The testimony of Nuccio and Costanzo does not of itself negative the testimony of appellant that he was in Mexico in 1933 and had gone there in his son's car. True, appellant in his later testimony denies that he made more than one trip and his wife supports him in that denial, although the extent of her personal knowledge on that point is not positively shown. However, the weight of their testimony as balanced against the earlier statements is, we submit, for the determination of the administrative tribunal, whose decision is made final by the statute.

We see no merit in appellant's attempt to distinguish the cases we have cited above. One asserted basis of distinction is that the aliens in those cases had counsel. In those cases, however, the aliens did not have counsel until after the disputed statements were made. Obtaining a statement from appellant while he was in custody and before he secured the services or advice of counsel did not constitute an invasion of his right to a fair hearing (*Kishimoto v. Carr,* supra, and cases cited therein). The fact that appellant did not have counsel attending the formal hearing under the warrant of arrest at McNeil Island is due to his own waiver; counsel had already been

engaged at Washington but apparently appellant did not desire the presence of counsel at the hearing at McNeil Island.

Another suggested basis of distinction advanced by appellant is that in the cases we have cited there was a real opportunity afforded the aliens to be heard. We submit that there was such opportunity in the case at bar. It is true that there was at first a denial of the application to reopen the case, on the ground that the supporting affidavit submitted therewith (i. e., the affidavit of Nuccio) would not negative the alleged visit to Mexico in 1933 but at most would tend to show another visit in 1929 (Id. pp. 138-137). However, complete opportunity to submit further evidence was afforded after the District Court's order remanding the case for that purpose. The evidence then introduced was carefully considered (Id. pp. 186-184), and this resulted in adherence to the former decision. Thereafter, the complete record was again reviewed by the District Court and the Court was then satisfied that there had been no unfairness and no abuse of discretion (T. 18).

We submit that the attempt to distinguish the authorities cited above is without substance. There are numerous other decisions to the same effect, but those cited sufficiently illustrate the settled rule.

We submit that the case of

Nagle v. Eizaguirre, 41 F. (2d) 735,

is not in point. In that case the arresting officers found the alien in the establishment of a prostitute. The prostitute at that time made a statement to the

officers wherein she asserted that the alien was employed by her in the house of prostitution as a cook. At the same time the alien confirmed her story in a similar statement. Subsequently it developed beyond question that the alien had in fact been employed in a mine at the time of his arrest, and for a number of years prior thereto, and that the prostitute had fleeced him of several thousand dollars by playing upon his sympathies and obtaining money from him at various times, ostensibly as loans. In the words of this Court in that case:

> "The testimony as a whole leaves no room for doubt that this prostitute fleeced the appellee of considerable sums of money and is now attempting to discharge her obligations by deporting him from the country."

In that case the first statement of the alien that he was employed as a cook in the house of prostitution was unquestionably false and was obviously made to avoid creating a conflict between his own account of his presence there and that given by the woman. We submit that the case is in no wise analogous to the case at bar.

CONCLUSION.

We submit that the case at bar is merely one involving a determination by the statutory tribunal based upon conflicting evidence, that its decision thereon is conclusive and that appellant was not denied a fair hearing.

It is further submitted that the decision of the Court below was correct and should be affirmed.

Dated, San Francisco,
September 23, 1940.

FRANK J. HENNESSY,
United States Attorney,
R. B. MCMILLAN,
Assistant United States Attorney,
L. R. MERCADO,
Assistant United States Attorney,
Attorneys for Appellee.

ARTHUR J. PHELAN,
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